modes preſcribed in *England.* This act expreſsly confines the remedy of the mortgagee to the recovery of *the principal and intereſt* due on the mortgage; and the proceedings under the law ſhew the uniform conſtruction of it. The *Scire Facias* is to ſhew cauſe why the land ſhould not be ſold for payment of the *principal and intereſt* due on the mortgage: When judgment is obtained, the *levari facias* is to levy *the principal and intereſt money only.* There is no penalty, no judgment for a penalty, and we might as well refuſe to ſtay proceedings in a ſuit on *a ſingle bill,* till a ſubſequent debt was diſcharged, as in this caſe of a mortgage. Upon the execution in both caſes, no more can be levied than the principal and intereſt. 1785.

Rule made abſolute.

BROWN *verſus* SCOTT *et al.*

RULE to ſhew cauſe why the report of referrees ſhould not be ſet aſide. The facts were theſe:—Four actions had been brought upon four promiſory notes, and the parties, being willing to refer them, by a written agreement entered a fifth action on the docket, in order to take in another note, which had become due ſince the return of the preceeding writs; and accordingly the whole were referred to perſons nominated by the Court, a rule for that purpoſe being taken out in each action. The parties were heard before the referrees, and the report agreed upon, when a difficulty occurred, how to apportion the ſum that was found due, or in what manner to make the report, if it was not apportioned. The referrees, therefore, applied to a gentleman of the law, who adviſed them to connect the five rules, and make one general report, for the whole ſum. Conformably to this advice, the following report was made. "We the referrees appointed in the annexed five rules of "Court to hear and determine the matters in variance between "plaintiff and defendants in the five ſeveral actions commenced by "the former againſt the latter, do adjudge that the defendants are "indebted to the plaintiff £1301, 3, 11, and that the ſame ought "to be paid accordingly." All the referrees ſigned the report, and two of them attended in Court, and gave teſtimony, that both parties were fully and patiently heard, and no objections were made, on either ſide, to the mode of proceeding. Nor was there any ſuggeſtion in the courſe of the argument, that the referrees had acted with partiality, injuſtice, &c.

The motion was ſupported by *Ingerſol, Coulthurſt* and *Heatly,* for the defendants, and they contended, that the report was neither certain, mutual, nor final.

1ſt. For that the report ſays £1301, 3, 11, is to be paid "accordingly"—accordingly to what? the mode of payment was a chief part of the diſpute; and this was left *uncertain.*

1785. 2d. For that the report contains no directions that theſe notes ſhould be delivered up; and as defendant cannot apply to a Court of Chancery, as he might in *England*, for an injunction, they may ſtill be circulated, and in the hands of a *bona fide* indorſee, ſo that the defendant may be compelled to pay the money over again; conſequently the report is neither *mutual*, nor *final*, *Cro. J.* 315. *Cro. C.* 112. 1 *B. M.* 304. 2 *B. M.* 1224. *Doug.* 362. 5. *Bac.* 289. 313.

3d. The reports of referrees under the act of Aſſembly are acknowledged to be different from awards at common law; but in fact there is little difference between them and verdicts. If, therefore, theſe actions had been tried by a jury, and a verdict given ſimilar to this report, no judgment could be given on it. *Co. Litt.* 227. *Hob.* 49. *Stra.* 1024. For on what action can the Court award execution, or how can they apportion the ſums?

Wilſon, *Sergeant* and *Sitgreaves*, for the plaintiff, were deſired by the Court to confine themſelves to the *laſt* objection, as the *firſt* was not ſupported by teſtimony; and with reſpect to the *ſecond*, it would overſet too many reports, were the objections of want of mu ality and not being final, upon ſuch grounds to defeat the report.

Taking up, therefore, the third objection, they argued that the referrees not being charged with partiality or miſconduct, the objections to the form of the report, muſt find a cold reception with the Court. If judgment cannot be entered upon the record as it ſtands, the Court may interrogate the referrees and divide the ſum; or they may allow the plaintiff to ſue out execution in one action, and releaſe the others, or by their own authority, the Court may interpoſe, and conſolidate the actions. 1 *Stra.* 420. But, in fact, it was contended, that the actions were already conſolidated by the conſent of the parties in the filed agreement; which is ſurely as much a part of the record, as a verdict, or a report; and by the ſubmiſſion of all matters in variance, the cauſe of action in each of the actions, is ſubmitted in every one of them. *Hob.* 54. 12 *M.* 234. *Stra.* 514. 3. *Bac. Abr.* 288.

Ingerſol in reply. Awards at common law differ ſo widely from reports under our act of Aſſembly, that ſcarce any authority upon the ſubject of the firſt, is applicable to the ſecond. In the firſt caſe, terms may be impoſed before the Court will grant attachments; but here the report is equivalent to a verdict, and the ſole point now, is, whether, if it were truly a verdict, judgment could be entered upon it. It was not diſcovered 'till late in the argument that the parties themſelves had conſolidated the actions; but upon the examination of the agreement nothing will appear that ſhews that intention, or produces that effect. It enumerates all the four actions, ſays that rules (in the plural) ſhall be entered in *theſe ſeveral actions*; and then there is a fifth action entered in this very agreement, which it is ſubſequently and ſeparately agreed to refer. At leaſt, therefore, this laſt action is not conſolidated.

To

To diſcontinue, or releaſe four, and ſign judgment upon the fifth, would be impoſſible, becauſe the report expreſsly compriſes more than the fifth action was brought for. And to call upon the referrees, and by their aſſiſtance divide the ſum, would be an illegal ſtretch of power, which was not to be apprehended from the court. Nor, as to the point of conſolidation, has the court authority to do more than grant imparlances in ſome of the actions, to induce the party to conſent that the trial of one ſhall decide the reſt, which would be no relief in the preſent caſe. 1785.

On the 15th of *November* the PRESIDENT delivered the opinion of the Court as follows.

SHIPPEN, PRESIDENT. The juſtice and fairneſs of the tranſaction, on the part of the plaintiff, is ſo obvious; and the conſent of the parties to conſolidate the actions, is ſo naturally implied from the whole of the proceedings, that my brethren* think the report ought to be confirmed.

For myſelf, I doubt the legality of it, becauſe I do not ſee how it is poſſible to enter judgment upon the report ſo as to avoid error. The conſolidation of actions is intended to ſave expence, and might have been ordered by the Court on motion; but this agreement of the parties does not appear to me to amount to a conſolidation, there being five ſeveral rules of referrence in the five ſeveral actions; and though, indeed, the referrees have undertaken to conſolidate them, I much doubt their authority ſo to do. Inſtead of finding a groſs ſum due on all the notes, they might have found what was due on each note, and have reported the ſeveral ſums on the ſeparate rules of referrence. However as my brethren think the report ought to ſtand, let it be confirmed, and the plaintiff may make up the record as he thinks ſafeſt.

Report confirmed.

MORRIS *verſus* TARIN.

A Caſe was made in this cauſe for the opinion of the Court, ſtating, that the defendant bought a bill of exchange drawn by *Benjamin Harriſon & Co.* upon a houſe in *France*, which was preſented to the drawee in *February* 1784, and proteſted for *non acceptance*. Before it was preſented, however, the drawee had become inſolvent, and an arrêt was iſſued by the *French* government, prohibiting the inſtitution of ſuits againſt him for a certain time. When the bill became due (the arrêt ſtill continuing in force) it was again preſented, and, on the 5th of *June* 1784, proteſted for *non payment*. Without any knowledge of the ſecond proteſt, and without any ſuit or compulſion of law, the plaintiff, who was one of the partners of the company that drew the bill, repaid the defendant the principal, intereſt, and charges, *with 20 per cent damages*: But, afterwards, conceiving that he had paid the 20 per cent damages in his own wrong, he brought this action to recover back the amount.

Sergeant

Elſeſon and *William Reſs*, Juſtices.